98-8770 (2)

Supreme Court, U.S.
FILED
MAR 31 1999
OFFICE OF THE CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

March Term, 1999

No.

JAMES MICHAEL FLIPPO,

Petitioner,

v.

STATE OF WEST VIRGINIA,

Respondent.

ORIGINAL

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

Ira Mickenberg

March 30, 1999

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QUESTION PRESENTED

Whether the state court erred by explicitly refusing to obey Mincey v. Arizona, and instead announcing a new rule of law establishing in West Virginia a "crime scene exception" to the warrant requirement of the Fourth Amendment, that permits police to search "anything and everything" at a crime scene without a warrant.

OPINIONS BELOW

1. The Order of the Kanawha County Circuit Court, denying Petitioner's motion to suppress is reproduced and attached as Appendix A.

2. The Order of the West Virginia Supreme Court of Appeals is reproduced and attached as Appendix B.

JURISDICTION

The final judgment and order of the West Virginia Supreme Court of Appeals was entered on January 13, 1999. This Court has jurisdiction to issue a writ of certiorari pursuant to 28 U.S.C. §1257.

STATEMENT OF THE CASE

Introduction

The courts of West Virginia have declared that they will no longer follow Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978).

In its place, they have announced a blanket exception to the warrant requirement that permits the police to search "anything and everything" at the scene of a crime -- without a warrant, and without particularized probable cause.

Immediately after the police removed Reverend James Flippo from the cabin where his wife had been killed, they secured the premises and made sure no other persons were present. Several hours later, without seeking or obtaining a warrant, officers seized Mr. Flippo's closed briefcase from inside the cabin. They opened the briefcase and removed a closed envelope. They opened the envelope and seized several damaging photographs, which were introduced at Mr. Flippo's trial.

Defense counsel made a motion to suppress the photographs as the product of an unlawful warrantless search. Counsel submitted a memorandum of law, explicitly relying on the authority of Mincey v. Arizona. The trial court denied the motion to suppress by establishing a crime scene exception to the warrant requirement:

> the investigating officers, having secured, for investigative purposes, the homicide crime scene, were clearly within the law to conduct a thorough investigation and examination of anything and everything found within the crime scene area.

Order of May 28, 1997, page 3.

This ruling is a direct violation of unambiguous, well-established constitutional law. The Supreme Court of Appeals of West Virginia has allowed the ruling to stand.

People convicted of crimes in West Virginia -- even people like James Flippo, who are sentenced to life without possibility of parole -- do not have an appeal of right. There is no intermediate appellate court, and the West Virginia Supreme Court of Appeals need not hear any case. James Flippo was convicted by a court that brazenly announced its refusal to follow accepted constitutional principles. The State Supreme Court knew this, turned its back on the law, and refused to even consider the case.

The Illegal Search and Seizure

The State's evidence against Reverend James Michael Flippo was purely circumstantial. There was no eyewitness identification. There were no confessions; no DNA tests; and no incriminating serology or fingerprint analysis.

The known facts were largely undisputed. Everyone agreed that on the night of April 30, 1996, Rev. Flippo and his wife, Cheryl, vacationed at a cabin in Babcock State Park, in Fayette County, West Virginia. Everyone also agreed that sometime around 2:30 in the morning, Rev. Flippo ran out of the cabin into a heavy rainstorm wearing only his underwear, and called 911 to report that he and his wife had been attacked. T. 550-552.[1] When the authorities arrived a few minutes later, they found Rev. Flippo waiting for them, obviously distraught, with bruises on the front and back of his head, and cuts and scratches on his legs. T. 526, H.23-24. His wife was

[1]References to page numbers in the trial transcript will be cited as T. #. References to page numbers in the transcript of the hearing on the motion to suppress physical evidence will be cited as H. #.

lying inside the cabin with severe head wounds, beaten to death.

Rev. Flippo told police that he was awakened by an intruder in the middle of the night; that the intruder knocked him out, and must have killed Mrs. Flippo while the Reverend was unconscious. T. 853-856.

When the police responded to Rev. Flippo's 911 call, they believed that he was the victim of a crime. T. 847. They did not then consider him a suspect, and did not take him into custody. H. 25, 36. The police did, however, take him to a hospital for treatment, and then to a police station for questioning. H. 19-32. After the police took Rev. Flippo to the hospital, officers searched his cabin. H. 130-131. The officers were not looking for any particular piece of evidence, and had no idea if the dozens of items they seized had any evidentiary value. The officers made no attempt to obtain a warrant.

Several hours after they secured the crime scene, police officers seized Rev. Flippo's closed briefcase, which was lying on a table inside the cabin. H. 135-136, 149. They opened and searched the briefcase without seeking or obtaining a warrant, and seized a closed envelope. They opened the envelope, also without seeking or obtaining a warrant, and seized several photographs. The police admitted that at the time of the seizures they had no warrant, and no idea of whether the photos, envelope, or briefcase were evidence of anything. See H.132. The pictures were later introduced at trial. T. 1087-1109.

Defense counsel moved to suppress the photographs, on the grounds that the police did not obtain a warrant, and there was no exception to the warrant requirement that could justify the search and seizure. Counsel also filed a memorandum of law in support of the motion, directing the trial court's attention to Mincey v. Arizona, in which this Court held that there can be no

"crime scene exception" to the warrant requirement of the Fourth Amendment. 475 U.S. at 395, 98 S.Ct. 2415.

The trial court denied the motion, ruling that when the police secure the premises of a crime scene, they may search "anything and everything" in the area without a warrant. Order of May 28, 1997, page 3.

The Trial

The photographs seized from James Flippo's briefcase were pictures of a partially nude man named Joel Boggess, a friend and congregant of Rev. Flippo.

Prior to trial, defense counsel learned of rumors that Rev. Flippo had a homosexual relationship with Joel Boggess. Both men vehemently denied this. T. 1553-1554. There was never any proof of these rumors, and the State never claimed that homosexuality had anything to do with Mrs. Flippo's death. Nonetheless, in an excess of caution, defense counsel made a pre-trial motion to preclude the State from mentioning anything about accusations of homosexuality. The motion was granted. Order of July 15, 1997, ¶3-5.

Despite the pre-trial ruling, the State repeatedly insinuated to the jury that Rev. Flippo was sexually intimate with Joel Boggess. The partially nude photos seized from the briefcase were introduced into evidence in the State's case-in-chief. The State also introduced evidence that Rev. Flippo and Mr. Boggess had once gone on a ski trip together, and had shared a motel room with only one bed . T.1581-6. Other State's witnesses testified about a group dinner that included Rev. Flippo, Mrs. Flippo, Mr. Boggess and two other couples, at which James Flippo and Joel Boggess engaged in silly horseplay in the restaurant, punching each other in the ribs and

shoulders. T.1303-1304

The State never tried to justify this evidence by claiming that homosexuality was relevant to the case. The State did not assert that homosexuality had anything to do with motive, intent, or anything else in the trial. Instead, the prosecutor disingenuously insisted that he was not suggesting anything about homosexuality at all. He said he was merely letting the jury know "that the relationship of these two men was more than just good friends." T. 1581.

When the State offered this excuse, the trial court made a finding of fact that the prosecutor had indeed been suggesting throughout the trial that Rev. Flippo was homosexual. The trial judge characterized the prosecution's innuendo by remarking, "It might show that [homosexuality] if you have a devious mind and think badly about it . . . . you were doing that to show that [Rev. Flippo's behavior with Joel Boggess] was something out of the ordinary. T. 1581. Despite this finding, though, and contrary to the court's pre-trial ruling, the trial judge permitted the State to make these insinuations.

The smarmy tone that dominated Rev. Flippo's trial, and the use to which the State put the illegally seized photographs is encapsulated in the prosecutor's closing argument to the jury:

> I didn't accuse Joel Boggess of being a homosexual. I didn't accuse him of being gay. I didn't accuse Mr. Flippo of being gay or homosexual. I never did that. . . .
>
> But I submit to you that most people in our society would think it's unusual . . . for a minister or pastor of a church to sleep with people in his church that he's not married to. . . .
>
> Pastor Flippo is spending nights sleeping with Joel Boggess, am I wrong to think that's improper? . . .
>
> I don't know what happened in that bed. . . .

> And I don't know exactly what the extent of the relationship was between Mr. Flippo and Mr. Boggess, but it appeared to be very close, very intimate.

T. 1880-1882.

The illegally seized photos provided a graphic visual representation of the State's extraordinarily improper closing argument.

In this fashion, the State used photographs seized through a blatant violation of the Fourth and Fourteenth Amendments to spread innuendo so prejudicial as to create additional violations of the Fifth, Sixth and Fourteenth Amendments, and thereby deprive James Flippo of a constitutionally fair trial.

REASONS FOR GRANTING THE WRIT

POINT ONE: THE STATE OF WEST VIRGINIA CANNOT REFUSE TO FOLLOW MINCEY v. ARIZONA. THE STATE COURT IN THIS CASE FLOUTED MINCEY BY ANNOUNCING A "CRIME SCENE EXCEPTION" TO THE FOURTH AMENDMENT'S WARRANT REQUIREMENT. IT THEN USED THAT UNCONSTITUTIONAL "EXCEPTION" AS THE ONLY BASIS FOR DENYING PETITIONER'S MOTION TO SUPPRESS.

Flippo v. West Virginia is one of those rare cases in which a state court openly and explicitly declares that it will not obey the United States Constitution and the rulings of this Court. When presented with controlling United States Supreme Court precedent, the West Virginia court simply announced a new rule of law -- one that has been squarely rejected by this Court, and held to violate the Fourth and Fourteenth Amendments.

In 1978, this Court held that a crime scene exception to the warrant requirement "is inconsistent with the Fourth and Fourteenth Amendments -- that the warrantless search of [an] apartment was not constitutionally permissible simply because a homicide had recently occurred there." Mincey v. Arizona, 437 U.S. at 395, 98 S.Ct. at 2415. During the past twenty years, this court has repeatedly confirmed the constitutional necessity of Mincey. Minnesota v. Dickerson, 508 U.S. 366, 372, 113 S.Ct. 2130, 2135, 124 L.Ed.2d 334 (1993); California v. Acevedo, 500 U.S. 565, 580, 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991); Horton v. California, 496 U.S. 128, 133 n.4, 110 SA.Ct. 2301, 2306, 110 L.Ed.2d 112 (1990); Smith v. Ohio, 494 U.S. 541, 110 S.Ct. 1288, 1289 (1990).

Despite this Court's clear direction over the last two decades, that there can be no constitutional "crime scene exception" to the warrant requirement, West Virginia has declared that within its boundaries, such an exception exists. According to the state court, in West Virginia, "anything and everything" at a crime scene may be searched and seized without a warrant. This unconstitutional rule was the court's sole basis for denying Petitioner's motion to suppress.

No other exception to the warrant requirement justified denying Petitioner's motion. This was not a search incident to arrest, because petitioner was not arrested until several days after the search. It was not a plain view seizure, because even the police officers admitted that the seized photos were not in plain view. To the contrary, they were hidden in a closed envelope inside a closed briefcase.

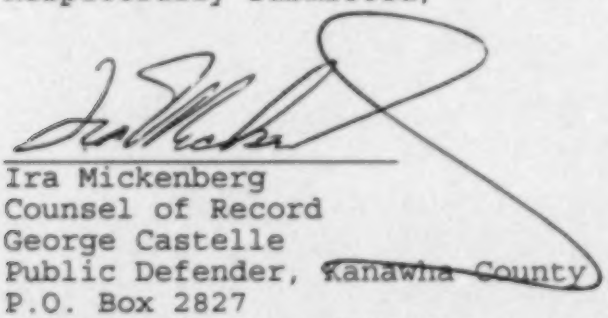
There were no exigent circumstances, because the police had secured the premises hours before they searched the briefcase and envelope. There was no possible danger that evidence would be destroyed or removed. It was not an inventory search, because the police admitted that they were searching for evidence, and never claimed to be following an inventory policy.

The sole issue in this case is whether the courts of West Virginia are required to obey the United States Constitution and the precedents established by the United States Supreme Court. The state court has announced that it will not do so. Certiorari should be granted to confirm that they must.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



Ira Mickenberg
Counsel of Record
George Castelle
Public Defender, Kanawha County
P.O. Box 2827
Charleston, WV 25330-2827
(304) 558-2323

APPENDIX A: Opinion of the Circuit Court of Kanawha County, West Virginia, Denying Petitioner's Motion to Suppress Physical Evidence

IN THE CIRCUIT COURT OF
FAYETTE COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA

vs. **INDICTMENT NO. 96-F-119**

JAMES MICHAEL FLIPPO

ORDER

On an earlier day, the Defendant filed various written motions in regard to the above-referenced felony indictment, and on January 22, 1997 a hearing was held incident to the Defendant's motions seeking a change of venue and to suppress any statements made by the Defendant to the investigating officers on the night and morning of the homicide in question, photographs and negatives taken by an investigating officer from a briefcase found at the crime scene, evidence obtained from the Defendant's body, photos taken of the Defendant's body, both pursuant to a Kanawha County Magistrate Court search warrant, certain documents given to investigating officers by a sister of the victim, and a statement made by the Defendant while being transported to confinement after a magistrate court appearance.

The evidence is abundantly clear that the investigating officers, from the time of the Defendant's early morning 911 call until approximately 10:06 a.m. on the morning of April 30, 1996, considered the Defendant to be a crime victim, not a suspect. The evidence is also abundantly clear that, during the aforementioned period of time, the Defendant was neither in custody, under arrest, nor suspected of any crimes, and was treated with care, politeness and professionalism by the investigating officers who were investigating an obvious homicide of the Defendant's wife, with the Defendant being considered, at that time, also a victim. At approximately 10:30 a.m. on the aforementioned morning, the investigating officers

ENTERED May 28, 1997
Crim. BK. 77 PGE. 122

apparently concluded, based on all that their investigation had, to that point disclosed, that they should consider the Defendant a suspect, and the Defendant was then advised by an investigating officer of his constitutional rights commonly referred to as the Miranda warnings, but he was neither charged, taken into custody nor arrested at that time. From that time, until approximately 2:00 p.m. on the same day, the Defendant waited, neither arrested nor charged with any crime, in the Fayette County Sheriff Department's offices for his lawyer to arrive. The Defendant's lawyer did arrive near 2:00 p.m.

At the crime scene, the investigating officers found on a table in Cabin 13, among other things, a briefcase, which they, in the ordinary course of investigating a homicide, opened, wherein they found and seized various photographs and negatives.

Because the state medical examiner, who had performed or was performing an autopsy on the victim, wished to observe the Defendant's injuries, a search warrant was obtained in Kanawha County, West Virginia, where the Defendant lived, for the purpose of obtaining blood samples from the Defendant, having photographs of the Defendant's injuries taken by the medical examiner's staff, having the medical examiner observe the Defendant's injuries and body, and having fingerprints and footprints taken by State Police officials. The evidence is abundantly clear that all of the aforementioned matters were lawfully obtained pursuant to the aforementioned search warrant, with the Defendant's lawyer being present.

Some days after the Defendant had been charged with his wife's murder, arrested and incarcerated, he apparently made some comments in a police vehicle while being transported by a Fayette County Corrections Officer to the Southern Regional Jail. The comments were made in the presence of other prisoners and the Corrections Officer. There is no evidence at all that the Corrections Officer did anything to solicit or encourage the Defendant's making any such statements. Said Corrections Officer, at the request of an investigating officer, wrote down the jist of what he remembered the Defendant saying.

Several days after the homicide, the victim's sister gave an investigating officer some notebooks and journals which she had apparently obtained from the home of the Defendant and the victim. The evidence is abundantly clear that the victim's sister brought this material to the investigating officer without the investigating officer having ever talked to her or requesting that she bring such material to him. The evidence is clear that the victim's sister was acting as a sister, not as an agent for the State.

The Court concludes that the investigating officers did not violate any of the Defendant's constitutional rights when they obtained any of the aforementioned statements from the Defendant. The statements were wholly voluntary, and obtained while the Defendant was clearly considered a crime victim, not a suspect. The evidence is clear that after the Defendant was properly advised of his constitutional rights and then invoked his right to counsel, the investigating officers obtained no further statements from the Defendant. The statement made by the Defendant while being transported to jail, was purely a voluntary statement made by the Defendant, and simply overheard by the Corrections Officer, who in no way solicited the Defendant to say anything.

The evidence is also quite clear that the aforementioned search warrant obtained by the investigating officers, and the evidence seized therewith, are not, in any manner, constitutionally infirm.

The Court also concludes that investigating officers, having secured, for investigative purposes, the homicide crime scene, were clearly within the law to conduct a thorough investigation and examination of anything and everything found within the crime scene area. The examination of briefcase found on the table near the body of a homicide victim in this case is clearly something an investigating officer could lawfully examine.

The Court further concludes that the documents brought to the investigating officers by the victim's sister were brought by the victim's sister of her own volition, not at the request of any investigating officer, and not in any capacity as an agent or quasi agent of the investigating officers.

Accordingly, based on all of the aforementioned, the contents of the court file, the transcript of the January 22, 1997 aforementioned hearing, and the written memoranda of law by all counsel, the Court concludes that the Defendant's motion to suppress all of the aforementioned matters is not well founded.

Accordingly, it is **ORDERED** that the Defendant's aforementioned motion to suppress be and the same is hereby denied.

Also, the Defendant, on January 22, 1997, offered evidence in support of his motion seeking a change of venue for the trial of the above-styled criminal case, and, on a later day, the State offered evidence, via in court testimony of a variety of adult, Fayette County citizens, from each of the three (3) magisterial districts of the county, in opposition to the aforementioned motion.

The Court, after due consideration of all of the evidence presented by the Defendant and the State and the written memoranda of law of all counsel, is of the opinion that the Defendant has failed to show good cause in support of his motion for change of venue. Further, the Court finds that the Defendant has fallen short of his burden of proving that, at the time of his motion for change of venue, a present hostile sentiment against the Defendant existed throughout all of Fayette County, which would deny the Defendant his right to a public jury trial by an impartial jury of Fayette County adults.

Accordingly, it is **ORDERED** that the Defendant's motion for change of venue be and the same is hereby denied.

It is further **ORDERED** that the trial of this case shall commence on Tuesday, July 15, 1997 at 9:00 a.m.

It is additionally **ORDERED** that all pretrial issues, both State and defense, shall be resolved prior to the morning of trial.

The Clerk shall mail an attested copy of this Order to Paul M. Blake, Jr., Fayette County Prosecuting Attorney, and David Schles, Attorney at Law, P. O. Box 786, Charleston, West Virginia 25323, counsel for the Defendant.

ENTERED this the 28th day of May, 1997.

5-28-97
cc: P/D
DS
PMB
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JOHN W. HATCHER, JR.
JUDGE

APPENDIX B: Order of the Supreme Court of Appeals of the State of West Virginia Refusing to Allow Petitioner to Appeal the Denial of His Motion to Suppress or Any Other Aspect of His Conviction.

JAN 28 1999
PUBLIC DEFENDER OFFICE

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 13th day of January, 1999, the following order was made and entered:

State of West Virginia, Plaintiff
Below, Respondent

vs.) No. 982196

James Michael Flippo, Defendant
Below, Petitioner

On a former day, to-wit, August 11, 1998, came the petitioner, James Michael Flippo, by Ira Mickenberg and Gregory L. Ayers, his attorneys, and presented to the Court his petition praying for an appeal from a judgment of the Circuit Court of Fayette County, rendered on the 30th day of April, 1998, with the record accompanying the petition.

Upon consideration whereof, the Court is of opinion to and doth hereby refuse said petition for appeal.

A True Copy

Attest: Deborah L. McHenry
Clerk, Supreme Court of Appeals

IN THE SUPREME COURT
OF THE UNITED STATES

March Term, 1999

No.

JAMES MICHAEL FLIPPO,

Petitioner,

v.

STATE OF WEST VIRGINIA,

Respondent.

CERTIFICATE OF SERVICE

I, Ira Mickenberg, a member of the Bar of this Court, hereby certify that on this 29th day of March 1999, a copy of the Petition for a Writ of Certiorari, and a copy of the Motion to Proceed in Forma Pauperis in this Court were mailed, first class postage prepaid, to Paul M. Blake, Jr., Prosecuting Attorney, for Fayette County, counsel for the respondent herein. I further certify that all parties required to be served have been served.

Ira Mickenberg, of counsel
Kanawha County Public Defender
P.O. Box 2827
Charleston, WV 25330-2827
(304) 558-2323
Counsel for Petitioner